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Citation: Bennett, T. (2018). Why so serious? Lachaux and the threshold of 'serious harm' in section 1 Defamation Act 2013. *Journal of Media Law*, 10(1), pp. 1-16. doi: 10.1080/17577632.2018.1446403

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Link to published version: <http://dx.doi.org/10.1080/17577632.2018.1446403>

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Why So Serious?

Lachaux and the threshold of “serious harm” in section 1 Defamation Act 2013

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ABSTRACT

In *Lachaux v Independent Print Ltd*, the Court of Appeal has held that s.1 Defamation Act 2013, which requires claimants in defamation cases to show that the offending statement has caused, or is likely to cause, serious reputational harm, was intended to “raise the bar” for claims above the standard previously demanded by the common law. However, despite finding that this was Parliament’s intention in enacting s.1, the Court then held that this intention had not actually been successfully implemented by the wording of the Act. As such, the Court of Appeal has determined that the tort of libel is today actionable *per se*.

The notion that libel is a tort that is actionable *per se* is one that has a lengthy heritage in the English common law. However, an examination of case law between 2005 and the passing of the 2013 Act reveals that libel had ceased to be actionable *per se* long before the new s.1 appeared on the statute books. The Court of Appeal’s ruling in *Lachaux* is thus troubling. For the court based its ruling on a misunderstanding of the position that the common law had reached prior to the recent legislation. This misunderstanding led the Court to believe that interpreting s.1 as imposing a requirement that claimants adduce evidence of “serious harm” to their reputations amounted to a “radical” alteration of the common law, for which insufficient express indicia were to be found in the wording of the section. This has resulted in the Court failing to interpret the Act in a manner consistent with the Parliamentary intention that it has identified, thereby frustrating that very intention.

INTRODUCTION

Is libel actionable *per se*, or not? That is the question at the heart of the case of *Lachaux v Independent Print Ltd*.¹ Determining answers to that question led first the High Court and then the Court of Appeal to consider a number of related matters that lend both judgments a rather busy and, at times, disjointed feel. But at base the question is a relatively simple one concerning the interpretation of s.1 Defamation Act 2013 and the state of the common law pertaining to libel prior to the Act coming into force.

The claimant, Bruno Lachaux, had brought a claim in libel against the defendants in respect of articles published in their newspapers and on their websites that contained allegations against him that he averred were defamatory of him. At the trial of preliminary issues in the claim – primarily the issue of the meaning of the articles – Warby J found these articles to be defamatory of Lachaux. The allegations were serious; the articles alleged (amongst other things) that he had been violent towards his estranged wife and that he had endeavoured to use the legal system of the United Arab Emirates to bring a false prosecution against his estranged wife in order to obtain custody of their son.

The defendant appealed, arguing that Warby J had erred in law when holding that the articles were defamatory of the claimant. In particular, it was argued that the judge was wrong to find that the articles were “likely to cause serious harm” to the claimant’s reputation, as required by s.1 Defamation Act 2013.² The claimant responded by arguing that, whilst Warby J had reached the correct decision in law, he had done so by taking an overly circuitous route; the “serious harm” test in s.1 did not require, as the judge had thought, evidence that the chances of serious reputational harm being caused by the articles was “more likely than not”.

The case is significant because it represents the first appellate treatment of s.1 Defamation Act 2013 and because, whilst the result reached at first instance is upheld, the Court of Appeal’s interpretation of s.1 differs considerably from that of the High Court. Most significantly, the High Court’s determination that libel

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¹ *Lachaux and AOL (UK) Ltd v Independent Print Ltd and Evening Standard Ltd* [2017] EWCA Civ 1334 (hereafter “*Lachaux (CA)*”).

² Section 1 of the Defamation Act 2013 provides:

1.— **Serious harm** (1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.

is “no longer actionable *per se*” is, in essence, rejected by the Court of Appeal. This rejection actually amounts to a reversal of the common law position prior to the Act. As such, libel has in fact *reverted* to being a tort that is actionable *per se*, something that it has not been accurate – either practically or formally – to describe libel as since 2005. This conclusion, and the Court of Appeal’s reasoning in reaching it, is problematic.

THE HIGH COURT JUDGMENT

In order for a statement to be defamatory it must, according to s.1 Defamation Act 2013, cause or be likely to cause “serious harm” to the claimant’s reputation. This, Warby J held, requires claimants to adduce evidence demonstrating either that “serious harm” has occurred, or that it is more likely than not to occur. Other than in circumstances where the meaning of the words complained-of is so serious that serious reputational harm is inevitable and can thus be inferred (for example, if the words purport to identify an individual as involved in a conspiracy to murder or committing a serious sexual crime), extrinsic evidence will need to be adduced in order to satisfy s.1. Whereas under the common law prior to the Act inferences as to the seriousness of the allegations could routinely be drawn simply from the offending words themselves, after the Act’s coming into force extrinsic evidence will normally be required.

In the event, Warby J found sufficient evidence of a likelihood that serious harm would occur to the claimant’s reputation to satisfy s.1. As such, his conclusion and that of the Court of Appeal – that the claimant had a valid claim for libel – are aligned. But Warby J’s finding that libel is not – as it had long been thought to be at common law – actionable *per se* caused consternation on appeal. This was because, in the Court of Appeal’s eyes, this signalled a significant and apparently radical shift in the law. Moreover, Warby J’s conclusion takes on a controversial appearance because there is no explicit mention in section 1 itself of an intention to alter the long-standing view that libel is actionable *per se*. If it was what Parliament intended, the statute is poorly drafted. For that intention appears – at best – obliquely and ambiguously in the text of s.1.

THE COURT OF APPEAL JUDGMENT

There is no disagreement between the Court of Appeal and the High Court in respect of the proper disposal of the case. However, the Court of Appeal rejects the notion that libel is no longer actionable *per se*. It denies that claimants must now ordinarily adduce extrinsic evidence of actual damage in order to show that words complained-of are “likely to cause” serious reputational harm; inferences of a likelihood of serious harm may continue – as before – to be drawn from the words themselves, and not just in the most extreme cases. Thus, whilst the Court of Appeal upholds Warby J’s first instance decision in terms of result, it departs significantly from his reasoning (and, in effect, reverses his interpretation of s.1).³

There are two matters in the Court of Appeal’s judgment upon which further comment is warranted. These are: first, the question of what Parliament had intended in passing s.1, and, second, the coherence of its interpretation of s.1 with the common law on the issue of whether libel claimants must prove some degree of reputational damage in order to found a valid claim. We will scrutinise each of these matters in turn. Before we do so, however, it is necessary to consider the state of the common law prior to the Act’s introduction.

THE COMMON LAW PRIOR TO THE DEFAMATION ACT 2013

In the High Court, Warby J had considered the state of the common law prior to the coming into force of s.1. In his view, two developments at common law had altered significantly the view – previously widely held – that libel was actionable without proof of loss or damage. These developments occurred in the cases of *Jameel*⁴ and *Thornton*.⁵

In *Jameel*, the Court of Appeal had struck out, as an abuse of process, a claim that disclosed no substantial tort in this jurisdiction. This was because although the claimant had suffered some reputational damage in England, publication of the offending words had been to a very small number of people and the extent of damages he could expect to receive by way of vindication would have been

³ As a result, the Court of Appeal’s decision also reverses the interpretation of s.1 in two other earlier High Court cases which are essentially aligned with Warby J’s decision in *Lachaux* (hereafter *Lachaux (HC)*): *Cooke v MGN Ltd* [2014] EWHC 2831 (QB), [2015] 1 WLR 895, and *Ames v The Spamhaus Project Ltd* [2015] EWHC 127 (QB), [2015] EMLR 13.

⁴ *Jameel (Yousef) v Dow Jones & Co. Inc.* [2005] EWCA Civ 75, [2005] QB 946.

⁵ *Thornton v Telegraph Media Group Limited* [2010] EWHC 1414 (QB), [2011] 1 WLR 1985.

“out of all proportion” to the cost of the litigation.⁶ Permitting a claim to proceed in these circumstances would risk violating the defendant’s Article 10 ECHR right to freedom of expression.

In *Thornton*, Tugendhat J held that a range of earlier cases – including some of the classic, seminal cases in defamation, and also the *Jameel* case – indicated, when read together, that the common law imposed a threshold requirement of “seriousness” that had the effect of barring trivial claims. According to Tugendhat J, the common law definition of what amounts to a “defamatory” statement “should be varied so as to include a threshold of seriousness.”⁷ This, he suggested, could be accomplished by adding some words to the classic definition as formulated by Neill LJ in *Berkoff v Burchill*.⁸ Tugendhat J’s revised wording thus read: “the publication of which [the claimant] complains may be defamatory of him because it substantially affects in an adverse manner the attitude of other people towards him, *or has a tendency so to do.*”⁹ He preferred the term “attitude” to “estimation” because it

makes clear that it is the actions of the right-thinking persons that must be likely to be affected (so that they treat the claimant unfavourably, or less favourably than they would otherwise have done), not just their thoughts or opinions.¹⁰

For Tugendhat J, then, the addition of the phrase “or has a tendency to do so” encapsulated the common law’s seriousness threshold. He finds this to be compatible with the long-standing presumption of damage in defamation cases (something with which Warby J agrees) and, indeed, to support that presumption:

If the likelihood of adverse consequences for a claimant is part of the definition of what is defamatory, then the presumption of damage is the logical corollary of what is already included in the definition. And conversely, the fact that in law damage is presumed

⁶ *Jameel*, (n 4) [69].

⁷ *Thornton*, (n 5) [95].

⁸ [1996] 4 All ER 1008, 1018.

⁹ *Thornton*, (n 5) [96]. (Emphasis is original. In Tugendhat J’s original judgment, the word “substantially” is included in square brackets in order to indicate that he added that word as well as the final, italicised section. For clarity, those initial square brackets have been removed here.)

¹⁰ *Thornton*, (n 5) [92].

is itself an argument why an imputation should not be held to be defamatory unless it has a tendency to have adverse effects upon the claimant. It is difficult to justify why there should be a presumption of damage if words can be defamatory while having no likely adverse consequence for the claimant.¹¹

Thus, for Tugendhat J, by the time *Thornton* came to be decided, the common law had already imposed a requirement that the claimant should show – whether by adducing evidence or by way of inference drawn from the severity of the offending words – a likelihood that she would suffer adverse consequences in the form of less favourable treatment at the hands of right-thinking others. An inability to show such a likelihood would render the claim a trivial one; it would fail to pass the seriousness hurdle (and would thus not be actionable). This was deemed to be just because only those claims that could demonstrate sufficient seriousness – by way of showing such a likelihood – were properly deserving of the presumption of damage that automatically comes with an actionable claim in libel. In other words, libel was no longer actionable without *some* proof of loss or damage. This “proof” might be provided by inferences drawn from the severity of the words used, for example, and the loss or damage contemplated need only amount to a likelihood of less favourable treatment at the hands of others. Nevertheless, the tort of libel no longer seemed to be actionable *per se* in a technical sense.

In *Lachaux*, the Court of Appeal suggests that there is a relevant distinction between *Jameel* and *Thornton* that means that the two cases do not actually prevent libel from (still) being actionable *per se*. The distinction is that, whilst *Thornton* concerns the question of whether or not the claim is actionable in the first place, *Jameel* is concerned only with whether a claim that has *already* been found to be actionable amounts to a real and substantial tort.¹²

This distinction, however, is less significant than the Court of Appeal would have us believe. *Jameel*, it must be recalled, was decided five years before *Thornton*. At the time, the question whether the statement was defamatory (that is, whether the claim was actionable) was thought to be distinct from the question of whether or not a substantial tort had been committed. But the effect

¹¹ *Thornton*, (n 5) [94].

¹² It might also be argued that *Jameel* is limited to cases in which jurisdiction is a live issue. For the reasons explored in the remainder of this short section, that argument does not seem persuasive.

of the *Thornton* ruling is to require some proof of damage in order to demonstrate that the offending statement is defamatory – that the claim is actionable in the first place. *Jameel* might be thought of as having set the scene for *Thornton*, in particular by setting out clearly the potential for an interference with Article 10 posed by a libel claim in which there was no evidence that substantial harm had been suffered. But *Thornton* had – prior to the Defamation Act 2013 and the *Lachaux* litigation – entirely encapsulated the salient requirements imposed on claimants by the common law. *Jameel*, whilst a supportive authority, was no longer a necessary component of the argument that libel was no longer actionable *per se*.

Nevertheless, the notion, adopted by the Court of Appeal in *Lachaux*, that libel had remained (and does remain) actionable *per se* is one that has persisted, notwithstanding the *Thornton* and *Jameel* rulings. It is well-rehearsed academically and it has long-standing precedential weight behind it. As Goddard LJ put it in the *Odhams Press* case:

A plaintiff can, if he likes, by way of aggravating damages, show that he has suffered actual damage, which he can prove, but in every case he is perfectly entitled to say ‘Here is a serious libel on me. The law assumes I must have suffered damage and I am perfectly entitled to substantial damages’.¹³

Despite the developments in *Jameel* and *Thornton* effectively ending the possibility of a libel claim subsisting absent *any* proof of damage (whether evidential or inferential), it has remained commonplace to describe libel – unhelpfully – as actionable *per se*. Leading legal textbooks continue to do this.¹⁴ Similarly, Tugendhat J appears not to have considered whether his conclusion on the seriousness threshold in *Thornton*, when combined with the *Jameel* ruling, had rendered libel no longer actionable *per se*. There is no mention in his judgment of any impact on libel’s actionability. Warby J, however, does acknowledge this effect of *Thornton* and *Jameel* in his High Court *Lachaux*

¹³ *English and Scottish Co-operative Properties Mortgage and Investment Society Ltd v Odhams Press Ltd* [1940] 1 All ER 1, 12-13.

¹⁴ See, for example, Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin’s Tort Law* (7th edn, OUP, 2013), 638. The most recent edition of Alistair Mullis, Richard Parkes and Godwin Busuttil (eds), *Gatley on Libel and Slander* (12th edn, Sweet & Maxwell 2013) continued to state (at 1.5) that libel was actionable *per se*, although a very recent supplement has now incorporated both the High Court and Court of Appeal judgments in *Lachaux*.

judgment when he states that “since *Jameel* it has no longer been accurate other than technically to describe libel as actionable without proof of any damage.”¹⁵ But he could have phrased this in stronger terms. For, as we have seen, arguably since *Jameel* and certainly since *Thornton*, it has not been accurate *even technically* to describe libel as actionable *per se*. Indeed, it is the very technical detail of those essentially procedural decisions that has rendered libel a tort ultimately dependent upon proof of damage.

THE MEANING OF S.1 DEFAMATION ACT 2013

A. THE HIGH COURT JUDGMENT

In the High Court, Warby J held that s.1 Defamation Act 2013 is “clearly more demanding” than the seriousness threshold identified in *Thornton*.¹⁶ The phrase “is likely to cause” in s.1 “should be read as ordinarily denoting more probable than not.”¹⁷ This is justified, he says, because that and similar phrases have been ordinarily held to mean that a balance of probabilities test is required.

There appear to be three key reasons for the conclusion that s.1 requires this “more demanding” approach. First, the history of the Act’s passage through Parliament shows that the legislature settled on a requirement of “serious harm” only after considering both “substantial harm” and “serious and substantial harm”. Since Tugendhat J’s threshold formulation in *Thornton* requires only a tendency *substantially* to affect reputation adversely, rather than a tendency *seriously* to do so, Warby J sees this as an indication that Parliament intended to “raise the bar” beyond the *Thornton* position.¹⁸ The Explanatory Notes to the Act, which were cited in argument by the defendant and noted by Warby J, reinforce this impression, as do the Parliamentary statements made by the Parliamentary Under-Secretary for Justice (albeit Warby J did not feel s.1 disclosed an ambiguity that warranted the invocation of the rule in *Pepper v Hart*¹⁹).

¹⁵ *Lachaux (HC)*, (n 3) [60].

¹⁶ *Ibid* [29].

¹⁷ *Ibid* [34], citing *Cream Holdings Ltd v Banerjee* [2004] UKHL 44, [2005] 1 AC 253 [21].

¹⁸ See further section B, below.

¹⁹ [1993] AC 593.

Second, the use in the section of the phrases “has caused” and “is likely to cause” differ significantly from the *Thornton* formulation. If Parliament had intended to preserve the *Thornton* approach, Warby J tells us, it could have adopted the *Thornton* terminology; Parliament does not legislate in a vacuum and must be taken to have knowledge of the common law governing the field in which it is legislating. In choosing to depart from that terminology, Warby J finds Parliament to have intended to alter – and not merely replicate – the *Thornton* position.

Moreover, Warby J finds that the combined effect of the *Thornton* and *Jameel* rules was to create a complex process whereby circumstantial facts are relevant only after the initial question of whether the words alone are capable of bearing a defamatory meaning has already been answered. By s.1, he insists, Parliament has legislated to simplify this arrangement, by “subsuming all or most of the *Jameel* jurisdiction into a new and stiffer statutory test requiring consideration of actual harm.”²⁰

Third, notwithstanding the second point, Warby J does not believe that attributing this intention to Parliament results in imputing an intention to alter the common law radically. Indeed, he labelled defence counsel’s suggestion that he would be imputing an intention to engage in a radical reworking of the law “alarmist and ill-founded”.²¹ This conclusion is worth scrutinising in detail before we turn to the Court of Appeal’s judgment.

Warby J holds that proof of damage, or of a likelihood that damage will occur, is required in order to satisfy s.1. He states that claimant counsel’s suggestion that this entailed a radical reworking of the law (no evidence of an intention to engage in which, she argued, could be found in s.1) is based on a “false premise”.²² The reason that it is “false” to suggest that his ruling means it will in all cases be necessary to adduce evidence to satisfy s.1, Warby J insists, is that it is still possible to make out a case in defamation by way of inference. He gives the example of a public figure accused in a national media publication of a “grave imputation” – a serious homicide or sexual crime.²³ Such a figure, he tells us,

²⁰ *Lachaux (HC)*, (n 3) [50].

²¹ *Ibid* [56].

²² *Ibid* [57].

²³ *Ibid*.

could hardly be required to call witnesses who read the words to say they thought the worse of the claimant in order to establish a claim. In such a case the common law rules for the objective assessment of the meaning and defamatory tendency of words are plainly unaffected, as is the single meaning rule.²⁴

The inference in such a case would arise from “the gravity of the imputation and the extent and nature of its readership or audience.”²⁵ He contrasts this example with “less obvious cases”, in which “it may be necessary for a claimant to prove some facts beyond the words themselves and the fact and extent of their publication.”²⁶ The rules, Warby J says, should not be any different as between the more and less obvious examples of defamation. By effectively eliding the *Thornton* and *Jameel* rules and combining them in a single, statutory test, s.1 ensures that more and less obvious cases are treated in the same fashion.

But if the rules are indeed to be uniform, the implication of this is that all claimants will need to adduce evidence to demonstrate – at the very least – the “nature and extent of [the statement’s] readership or audience.”²⁷ This is a necessary implication of Warby J’s conclusion that the standard to which the claimant must prove the likelihood of serious harm is “more probable than not.” Thus when Warby J suggests the claimant’s arguments on this point are based on a “false premise”, he appears to overstate matters. For, by his own admission, evidence as to the “extent and nature” of publication will be needed in all cases. He might have justified this by saying that it goes no further than the combined effect of *Thornton* and *Jameel*, but that would undermine his assertion that Parliament intended to “raise the bar” in s.1. Thus, Warby J finds himself somewhat (though not fatally) hampered by a tension between his belief that Parliament has intended to “raise the bar” and claimant counsel’s argument that this entails imputing to Parliament an intention to engage in radical reform of the common law in a statutory provision that does not make this explicit.

In order to deal with this tension, Warby J adopts a different line of justification for his interpretation of s.1 (a line that is not obviously commensurate with that

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid [58].

²⁷ Ibid [57].

which precedes it). For he states, just two paragraphs later, that “my construction of s 1(1) means that libel is no longer actionable without proof of damage, and that the legal presumption of damage will cease to play any significant role.”²⁸ At this point, he rejects both the suggestions that this entails radical reform *and* that Parliament has not expressly stated its intention to act radically. “These ... are necessary consequences of ... the natural and ordinary, indeed the obvious meaning of s 1(1).”²⁹ Warby J thus concluded

that by s 1(1) Parliament intended to and did provide that a statement is not defamatory of a person unless it has caused or will probably cause serious harm to that person’s reputation, these being matters that must be proved by the claimant on the balance of probabilities.³⁰

B. THE COURT OF APPEAL JUDGMENT

The leading judgment in the Court of Appeal is given by Davis LJ. Rejecting Warby J’s interpretation of s.1, he finds (with Sharpe and McFarlane LJ agreeing with him) that s.1 does not require the claimant to adduce evidence of reputational harm and that libel thus remains, as it has long been thought to be, actionable *per se*.

Davis LJ agrees with Warby J that Parliament intended, in passing s.1, to “raise the bar” above the threshold set in *Thornton* and the strike out rule in *Jameel*.³¹ There was a “clear” intention to “weed out ... trivial claims.”³² Moreover, the term “serious”, used in s.1, “conveys something rather more weighty” than *Thornton*’s term, “substantial”.³³ In Davis LJ’s view, however, it is not clear that Parliament has succeeded in achieving its aim by the wording used in s.1.

The use of the phrase “is likely to” in s.1 (in respect of causing serious harm) gives Davis LJ some trouble. He admits to being initially attracted to the notion that “is likely to” conveys “something rather stronger” than “a tendency to

²⁸ Ibid [60].

²⁹ Ibid.

³⁰ Ibid [65].

³¹ *Lachaux (CA)*, (n 1) [36].

³² Ibid [43].

³³ Ibid [44].

cause” (the phrase used in *Thornton*).³⁴ But he then finds himself wondering whether there will be much in the way of a difference – in practical terms – between a “tendency to cause” and a likelihood of causing.³⁵ Having sown the seeds of doubt in his mind, Davis LJ then points out that the phrase “is likely to” does not have a settled meaning in all statutory contexts; it is not consistently held to mean “more likely than not” in the sense of a balance of probabilities test. Indeed, quoting from the *Cream Holdings* case – that Warby J had regarded as settling the question of the meaning of this phrase – Davis LJ recalls that Lord Nicholls said explicitly that “... “likely” in s.12(3) [of the Human Rights Act 1998] cannot have been intended to mean “more likely than not” in all situations.”³⁶ Indeed, “its meaning depends upon the context in which it is used.”³⁷

Davis LJ does not agree with Warby J that “likely to cause” unequivocally bears the meaning of “more likely than not” in the context of s.1. Whereas Warby J had held that, if Parliament had intended the phrase to mean something other than that it could have – and would have – said so expressly, Davis LJ insists that, since Parliament is taken to be aware of existing common law doctrine, it must be aware of the judgment in *Cream Holdings*. Moreover, following the *Cream Holdings* guidance, the “context” within which the meaning of the word “likely” must be interpreted is, Davis LJ tells us, the law of defamation. And in defamation cases, the terms “likelihood” and “tendency” have, historically, been used essentially interchangeably.³⁸ Given that Parliament must be taken to be aware, therefore, that the term “likely” is generally used interchangeably with the term “tendency” in defamation, in the absence of any express language indicating an intention to give “likely to cause” a different meaning, s.1 must be interpreted as imposing no more stringent a requirement than the common law previously imposed.

Two further matters arising from Warby J’s judgment concerned Davis LJ. First, the fact that Warby J’s interpretation “effectively removes the presumption of damage which heretofore had always been a concomitant of the

³⁴ Ibid [46].

³⁵ Ibid.

³⁶ Ibid, quoting from *Cream Holdings Limited v Banerjee* [2004] UKHL 44, [2005] 1 AC 253, [20] (Lord Nicholls).

³⁷ *Cream Holdings*, *ibid*, [12].

³⁸ *Lachaux (CA)*, (n 1) [49]. Davis LJ cites, as examples, *Thornton* at [93], *Berkoff v Burchill* [1996] EWCA Civ 564, [1996] 4 All ER 1008, and *Andre v Price* [2010] EWHC 2572 (QB).

tort” particularly troubled him.³⁹ He sees this as attributing to Parliament an intention to engage in more radical alteration of the law than can be found in the text of s.1:

The actual language of s.1(1) does not compel a conclusion that the presumption of damage is intended to be abolished: and elsewhere the 2013 Act makes it specific where an aspect of the common law is intended to be abolished.⁴⁰

At one point in the judgment, Davis LJ remarks that “it can be important to distinguish the harm caused to reputation by the publication of falsehoods from the consequences that may flow therefrom.”⁴¹ By this, he appears to be communicating some misgivings about requiring claimants to adduce evidence of *actual* damage, as opposed to establishing a likelihood of reputational harm occurring solely by drawing inferences from the severity of the offending words. Davis LJ clearly sees this remark as an important step in his argument that s.1 does not have the effect of preventing libel being actionable *per se*.

As we have seen, even prior to the Act, libel was no longer actionable *per se* in a technical sense. For requiring a claimant to demonstrate that an inference as to the likelihood for reputational harm may be drawn from the severity of the words used is a requirement to adduce *some* “proof” of this expected damage. In other words, drawing an inference is not a way of establishing a claim without any proof of damage. It is, rather, a way of providing some proof of damage (albeit not rising to the level of evidence of the nature and extent of publication that is, according to Warby J, now required by the Act). But Davis LJ does not seem to see it that way. And because he sees Warby J’s judgment as eliminating the possibility to establish a claim without *any* proof of damage, he sees the High Court’s interpretation as a radical one.

Second, Warby J’s interpretation would lead to a situation where, for the purposes of determining the limitation period (which in defamation is one year from the date the cause of action accrues), claimants are left with no clear idea of when time starts to run. Under the traditional approach, the limitation period begins when the offending statement is published. But under Warby J’s

³⁹ *Lachaux (CA)*, *ibid*, [58].

⁴⁰ *Ibid*.

⁴¹ *Lachaux (CA)*, *ibid*, [27].

interpretation of s.1, the limitation period would begin only when serious harm occurs or a likelihood of serious harm (on a balance of probabilities) arises. This would lead to defamation becoming “creating some kind of ambient cause of action, drifting in and out of actionability”, which would not only be problematic on its own terms but would also put it at odds with other major torts.⁴² This point reinforces Davis LJ’s belief that such an alteration to the common law would be radical and that, in the absence of express wording in the section to that effect, Parliament cannot be taken to have intended such a significant reworking.

WHAT’S IN A RIGHT?

At base, the crux of the disagreement between the High Court and Court of Appeal in *Lachaux* is two differing views on the radicalness of the alteration to the common law position that Warby J’s approach to interpreting s.1 allows for. In simple terms, the two courts agree that Parliament does not intend radical changes in the absence of express wording to that effect. Where they disagree is on the issue of whether Warby J’s interpretation of s.1 amounts to radical change. For Warby J, the notion that s.1 makes libel actionable only upon proof of damage does not radically alter the position that the common law had found itself in by the time both the *Jameel* and *Thornton* rules had become routine parts of defamation method. For Davis LJ, this approach to s.1 did go further than the common law, and reversing the long-standing presumption of damage could only properly be regarded as a highly significant alteration.

Both Warby J’s and Davis LJ’s conceptualisation of the relationship between the wrongful act and the harm suffered by the claimant follow what Eric Descheemaeker has termed a “unipolar” model.⁴³ According to this model, wrongs and losses/harm are conflated. The harm suffered inheres in the commission of the wrongful act. In essence, both the wrong committed and the harm suffered are the diminution of the claimant’s right. Whilst both judgments adopt this basic model, the rights that they conceptualise *within* that model actually differ significantly from one another.

⁴² Ibid [60].

⁴³ Eric Descheemaeker, ‘The harms of privacy’ (2015) 7(2) Journal of Media Law 278.

Warby J sees libel law as protecting nothing more or less than a right to reputation. It is, in his view, up to the claimant to demonstrate that his or her good reputation has been traduced. One's reputation is traduced by a "defamatory" statement. By enacting s.1, Parliament has insisted that a defamatory statement is only one that causes, or is likely to cause, "serious harm". Anything less is simply not defamatory. Thus, the claimant has more to prove than was once the case, but there is no necessary separation between the act of defaming a person and the causing of harm to that person. Indeed, the act of defaming *constitutes* – by definition – the causing of harm.

Whilst Davis LJ also adopts a unipolar understanding, he conceptualises the claimant's right differently. In his hands, the claimant's right becomes one not merely to his or her good reputation, but a right to not have untrue things that have a *tendency* to lower his or her reputation in the estimation of others said about him or her publicly. The right as conceptualised by Davis LJ is thus significantly broader. Indeed, it harks back to a (pre-Human Rights Act) time when a claimant could successfully sue in libel where an untrue statement that would tend to lower him in the estimation of others was published but where, as a matter of fact, only nominal damage – if any – *actually* accrued to the claimant's reputation.⁴⁴ As Lord Phillips MR put it in *Jameel*, liability on this understanding simply "turns on the objective question of whether the publication is one which *tends* to injure the claimant's reputation."⁴⁵

Of course, Warby J insists that the time when such a claim could be brought at common law has long since passed. By contrast, it seems that Davis LJ's interpretation of s.1 actually *broadens* the individual right at the heart of the tort of defamation, causing it to revert to a much earlier state. This is something that clearly goes against the intention of Parliament as expressed in the Explanatory Notes and ministerial statements in Parliament. With this in mind, it is worth considering the extent to which the High Court and Court of Appeal differ in their attentiveness to the contextual background within which *Lachaux* sits.

ATTENTIVENESS TO CONTEXT

⁴⁴ For example, *Hough v London Express* [1940] 2 KB 507, 515.

⁴⁵ *Jameel*, (n 4) [37].

Attentiveness to the broader context within which a particular statutory provision sits is vital for the interpretation of that provision. Whilst the Court of Appeal's judgment in *Lachaux* makes some of the right noises about context, it does not attend sufficiently intently to the state of the common law prior to the Act's passage. This leads it to reach an interpretation of s.1 that is strangely at odds with its own analysis of Parliament's intention.

Both the High Court and Court of Appeal judgments invoke – in aid of their own preferred constructions – the idiom that Parliament, when legislating, must be taken to be aware of the existing common law in the field. However, the High Court attends closely to the formal intricacies of defamation in the common law, focusing intensely on the *Jameel* and *Thornton* rulings and on the interplay between the two. By contrast, the Court of Appeal takes a broad-brush view of the common law, dwelling on the long-accepted – but formally inaccurate, post-*Jameel* – notion that libel is actionable *per se* while eschewing relevant, technical details. Having (erroneously, at least in formal terms) decided that libel has always been actionable *per se*, the Court of Appeal concludes that an interpretation of s.1 that changes libel into a tort that requires proof of damage is too radical. Absent express wording, Parliament cannot, it holds, have intended such a radical change to the common law. But the change appears so radical *only* because the Court of Appeal did not attend sufficiently to the practical – and formal – reality of the pre-Act common law.

Both courts acknowledge that Parliament did intend to “raise the bar” for claimants. But whilst the High Court judgment attributes significant weight to this aspect of s.1's context, the Court of Appeal attributes it very little. As a result, the Court of Appeal judgment ends up in a rather bizarre tangle. For whilst it has identified a Parliamentary intention to “raise the bar” in s.1, its interpretation of s.1 does not amount to a raising of the bar at all. The Court of Appeal is not wrong to suggest that there may be circumstances in which a statutory provision is so poorly drafted that, despite a reasonably clear legislative intention, it cannot be given effect in such a way as to realise that intention. But s.1 is not so poorly drafted. This is apparent because the High Court arrived at an entirely formally acceptable interpretation that does give effect to the legislative intention identified.

The Court of Appeal did succeed in attending to one contextual matter that the High Court did not address: the overriding objective of the Civil Procedure Rules (CPR). The Court of Appeal recalls that the purpose of the codified CPR is to streamline court proceedings and improve the efficiency of the civil justice system. Elsewhere in the Defamation Act 2013, moreover, Parliament had enacted measures designed to make defamation cases faster and less costly to deal with.⁴⁶ Against this contextual background, the Court of Appeal finds the High Court's interpretation of s.1 problematic. This is because requiring claimants to adduce evidence of reputational harm at the outset will undoubtedly increase the length and cost of proceedings (in *Lachaux*, the High Court scheduled a two-day hearing for this purpose). The Court of Appeal thus focuses more than the High Court does on the procedural implications of its ruling for future cases, as it also does when it considers the undesirability of uncertainty in knowing the date upon which a cause of action for libel will accrue (for limitation purposes).

However, the Court of Appeal did not deal with the implications of its ruling for the existing *Jameel* doctrine. Whilst *Thornton*'s threshold has been subsumed into s.1, it is far from clear what the Court of Appeal thinks has become of *Jameel*. It has not been expressly overruled (indeed, the Court of Appeal, bound by its own decisions, cannot overrule it). But the Court of Appeal's insistence that libel is – once again – actionable *per se* casts doubt on whether *Jameel* can still properly be used to strike out claims solely on the basis that insufficient reputational harm, or a likelihood thereof, can be evidenced. For to strike out a claim on that basis would mean – as the High Court acknowledged – that libel is in effect *not* actionable *per se*, which would conflict with the Court of Appeal's ruling in *Lachaux*.

There is one further, related contextual matter that, curiously, plays no role in either judgment, but which has clear relevance to the point about the future of *Jameel* in the light of the Court of Appeal's decision. This is the context provided by the jurisprudence of the European Court of Human Rights that has, in recent years, declared that an individual's reputation is part of the right to private and family life guaranteed by Article 8 of the Convention.⁴⁷ *Jameel* recognised that refusing to strike out libel claims that did not amount to a “real

⁴⁶ For example, the reversal of the presumption in favour of jury trial in s.11.

⁴⁷ The Strasbourg court has held definitively that Art.8 ECHR embraces reputational interests, see *Cumpana v Romania* (2004) 41 EHRR 200 (GC), [91] and *Pfeifer v Austria* (2007) 48 EHRR 175, [33] and [35].

and substantial tort” could amount to a disproportionate interference with a defendant’s Article 10 right to freedom of expression (given particular statutory prominence, albeit with little practical impact, by s.12 Human Rights Act 1998). But *Jameel* was handed down before the ECtHR Grand Chamber ruling in *Pfeifer* confirmed the right to reputation as an aspect of Article 8 – a ruling that, formally, levels the playing field between claimant and defendant in defamation. An argument could be made, in an appropriate case, that striking out a case under the *Jameel* rule might disproportionately interfere with the claimant’s Article 8 rights. At the very least, the notion that *Jameel* was a necessary corrective to an earlier position at common law that paid insufficient attention to Article 10 interests can now be challenged, since “neither [Article 8 nor 10] has as such precedence over the other.”⁴⁸ This would not be a novel type of argument in defamation law; in *Flood v Times Newspapers Ltd*, Tugendhat J held that Lord Nicholls’ guidance on the *Reynolds*⁴⁹ defence – that, all other matters being equal, the court should find in favour of publication – could no longer stand in the light of developments in the ECtHR.⁵⁰

CONCLUSIONS

In *Lachaux*, the Court of Appeal has arrived at an interpretation of s.1 Defamation Act 2013 that goes against the intention it attributes to Parliament in passing the provision. The Court has woven itself a thoroughly tangled web indeed. Yet this was entirely avoidable. Both the High Court’s and Court of Appeal’s respective interpretations of s.1 are defensible – each has valid reasons that can be mobilised in support of the claim that its interpretation is correct. But only the High Court’s decision is sufficiently attentive to the formal reality of the state that the common law had found itself in prior to the passing of the Act. As such, the High Court’s decision – whilst imperfect – attributes the more sensible meaning to the Act.

As a result of the Court of Appeal’s decision, however, we are left with some clear but problematic guidance. Libel is actionable *per se*. A claimant need only prove that words complained-of have a tendency to cause serious reputational harm in order to found a cause of action. The cause of action will accrue on the date upon which publication of the offending statement takes place (and not, as

⁴⁸ *Re S (A Child)* [2004] UKHL 47, [2005] 1 AC 593, [17] (Lord Steyn).

⁴⁹ *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.

⁵⁰ [2009] EWHC 2375 (QB), [2010] EMLR 8, [146].

became a necessary corollary of the High Court's decision, upon the date that a likelihood of serious harm arises). The upshot of this is that claimants in defamation now face a task that is no more arduous when bringing libel claims than they did prior to the Act, despite Parliament having intended the opposite result. And the right that they are able to protect thereby is one even broader than Parliament contemplated. It is a right that has not been seen in England since the Court of Appeal recognised in *Jameel* that it could lead to a disproportionate interference with Article 10 ECHR. It is a right not only to one's good reputation, but to a freedom from criticism of a sort that would have a *tendency* to cause serious reputational harm – even if none ever actually occurs.